MAR 19 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 321

RUBY NELL THOMSON, *Petitioner*

vs.

TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

RESPONDENT'S BRIEF ON THE MERITS

* * *

JOHN B. POPE
J. B. LOOK
WAGSTAFF, HARWELL, ALVIS & POPE
Citizens National Bank Building
Abilene, Texas

Attorneys for Respondent

INDEX

	Page
Questions Presented for Review	1
Statement of the Case	2
Summary of Argument	6
Argument:	
I. There was insufficient evidence of negligence to present a jury issue since Petitioner failed to prove any duty owed to her by the Respondent	7
II. This Court should affirm a cause involving only a sufficiency of the evidence question if the opinion below is neither capricious nor unreasonable and is based on a fair appraisal of the record	14
Conclusion	20
Certificate of Service	20

LIST OF AUTHORITIES

Cases: Page

August vs. Texas & N. O. Ry. Co.
265 S. W. (2d) 148 10

Blair vs. Baltimore & Ohio Ry. Co.
323 U. S. 600 11

Brady vs. Southern Ry. Co.
320 U. S. 476 13

Comiskey vs. Pennsylvania RR. Co.
228 Fed. (2d) 687 11

Eckenrode vs. Pennsylvania R. R. Co.
164 Fed. (2d) 996 13

Ferguson vs. Moore-McCormack Lines,
25 U. S. Law Week 4130 ..... 15, 16, 19

Great Atlantic & Pacific Tea Co. vs. Evans
175 S. W. (2d) 249 10

Herdman vs. Pennsylvania RR. Co.
25 U. S. Law Week 4117 ..... 15, 16, 19

Holder vs. St. Louis-San Francisco Ry. Co.
172 Fed. (2d) 217 8

Labor Board vs. Pittsburgh Steamship Co.
340 U. S. 498 15

Louisville & N. R. Co. vs. Willhite
187 S. W. (2d) 1010 9

Louisville & Nashville R. Co. vs. Green
53 So. (2d) 358 10

Lowden vs. Bowen, 183 Pac. (2d) 980 10

Mercier vs. Texas & N. O. RR. Co.,
293 S. W. (2d) 80 10

Milwaukee & St. Paul Railway Co. vs. Kellogg
94 U. S. 469 8

Moore vs. Chesapeake & Ohio Railway Co.
340 U. S. 573 19

Rogers vs. Missouri Pacific Ry. Co.
25 U. S. Law Week 4113 ..... 15, 19

Schulz vs. Pennsylvania RR. Co.
350 U. S. 523 12

Stone vs. New York, Chicago & St. Louis Ry. Co.
344 U. S. 407 11

Texas & Pacific Ry. Co. vs. Rampy
71 S. W. (2d) 387 9

Tiller vs. Atlantic Coast Line, 318 U. S. 54 11

Wadiak vs. Illinois Central RR. Co.
208 Fed. (2d) 925 9

Webb vs. Illinois Central Ry. Co.,
25 U. S. Law Week 4116 ..... 15, 19

Western Union Telegraph Co. vs. Coker
204 S. W. (2d) 977 11

Wilkerson vs. McCarthy, 336 U. S. 53 ..... 12, 17

Wolfe vs. Henwood, 162 Fed. (2d) 998 13

Miscellaneous:

A. L. I. Restatement of Torts, Par. 310 8

36 A. L. R. (2d) 22 *et seq.* 10

175 A. L. R. 1003 *et seq.* 10

69 Harvard Law Review, 1441 *et seq.* 16

IN THE

SUPREME COURT OF THE UNITED STATES

No. 321

RUBY NELL THOMSON, *Petitioner*

vs.

TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

BRIEF FOR THE RESPONDENT

* * *

QUESTIONS PRESENTED FOR REVIEW

1. Is a jury issue presented when a railroad worker is injured while merely performing the usual and customary task of her position without any protest that the work is too strenuous and without any request for assistance?

2. In cases that solely involve an analysis of the factual situations, should the Supreme Court second-guess the lower appellate court, or should it confine its review toward determining whether or not the opinion below is capricious, unreasonable and whether it is based upon a fair appraisal of the record?

STATEMENT

PLEADINGS

The petitioner pled her case based upon the following situation:

On the morning in question she "met Number two train, she noticed that there was an unusually large quantity of Christmas mail to be unloaded from the train, and realizing that she was just a woman and that the mail was extremely heavy, she asked her immediate superior, a man whose name is unknown to the Plaintiff at this time, for help in unloading this heavy mail, but that her superior not only failed, but refused to give her any assistance whatsoever in unloading this heavy mail even though he and other people were available for assistance. Plaintiff says that this immediate superior then ordered the Plaintiff to unload the mail—as she was attempting to do so, she injured her back causing severe injuries to her back." (Tr. 8)

Respondent denied the above allegation. (Tr. 5)

EVIDENCE

The evidence taken in the light most favorable to Petitioner and the undisputed evidence shows the following:

Petitioner was a telegraph operator working for the Respondent. A vacancy occurred in the Monahans, Texas, Station and Petitioner bid for the job. One of her regularly assigned duties was to work the mail and

baggage on any trains that came in on her shift (Petitioner, Tr. 14). Petitioner testified that this was normally part of the agent-operator job everywhere (Petitioner, Tr. 34). In this regard Mrs. Thomson testified on direct examination, as follows:

"Q. Is it normally part of the agent-operator's job to handle mail?

"A. Oh yes, yes." (Petitioner, Tr. 34).

And again on cross-examination, as follows:

"Q. And now, where had you worked where it entailed handling baggage and mail? Mail, particularly mail, is what I am interested in.

"A. Just like I say, the first twenty-five minutes I was on duty I started working mail and I worked that job, I think it was two weeks, and then I worked the mail on Number Eight and on Number Seven, both, and then—well, any place I worked that there was mail to be handled, and the train came on my shift, I just automatically handled the mail.

Usually the agent left a little list on the desk that states for any operator that is relieving temporarily or is new in the office, can read this list and he will name the duties that each operator on that shift will have to perform. And if you are new in the office you just read the list. It is usually there somewhere around the telegraph table, and he will list all the duties you are to perform, and usually it is mail and baggage if there

is a passenger train on that shift that way that is your duty to perform.

"Q. Well, you worked a considerable number of trains then prior to your injury?

"A. I worked them whenever it was necessary for me to.

"Q. And it was usually necessary, wasn't it?

"A. Yes, usually." (Petitioner, Tr. 42-43). She had worked at Monahans before and knew that the job entailed handling mail before she bid for the job (Petitioner, Tr. 38-39) before the date of the alleged accident and she had never had any difficulty in handling her duties before (Petitioner, Tr. 27), even though it was usually necessary in whatever station she was working to handle the mail and baggage (Petitioner, Tr. 43).

The record does show that when she worked in another division for the Railroad she had a conversation with the superintendent with that division who informed her it was all right to wear skirts and hose so long as her job got done (Petitioner, Tr. 16). In this connection Petitioner testified on direct examination, as follows:

"Q. And you were instructed it was all right for you to wear skirts, is that correct?

"A. Just as long as my duties went along satisfactorily and there was no delay in the train it was perfectly all right and he thought it was a fine idea." (Petitioner, Tr. 16).

That for some few weeks she had not handled mail at Monahans, leaving it to others, but that Mr. Higginbothan, the agent in charge of the Monahans Station, reminded her it was her duty to handle the mail. (Higginbothan, Tr. 96-97). This was the only conversation she ever had with her superior about her mail handling and happened some time before the day of the injury. Petitioner worked the mid-night to 8:00 A. M. shift and train Number two was the only train that she was called upon to work during that period. It arrived in Monahans about 7:20 A. M. and it was a very light train insofar as mail and baggage was concerned (Sligh, Tr. 100). The record further conclusively shows, and Petitioner in her brief admits, that she never complained to anyone, her superiors or her fellow workers, that this duty was too heavy for her. (Tr. 91-98)

Briefly, the duties of Petitioner in handling the mail were as follows:

The postal employees bring the mail to the station where they load it up on four-wheel carts which in railway parlance are known as "trucks". A picture of such a truck being shown in Defendant's Exhibit No. 1 (Tr. 36A). This truck is in the mailroom which is locked. The operator gets the key to the mailroom, pulls the truck out onto the station platform, and when the train stops, pulls the truck alongside the railway post office car, climbs upon the truck and transfers the mail on the truck to the railway post office car by handing the mail sacks to the railway post office man. The railway post office man then transfers the mail from the railway post office car destined

for the particular station onto the truck by handing the mail sacks to the operator on the truck. The operator on the truck, when this operation is completed, pulls the truck off away from the train. It was while moving the truck away from the train that she felt a pain in her back.

No defect was shown to have existed on or about the platform, the truck, or the railway post office car and plaintiff does not in her brief claim any such defect.

Mrs. Thomson had been consulting a physician about some kidney infection she had had immediately prior to this occasion. (Tr. 129-136; Bell, Tr. 138-139). There is no evidence that she had told her superior or any of her co-employees of her illness or disability in this regard.

There was no evidence that more than one person could stand on the truck and in the doorway of the R. P. O. Car and transfer the sacks of mail and thus no evidence that an additional person assigned to the job could have prevented the injury.

SUMMARY OF ARGUMENT

I. No jury issue of negligence was presented, since there was absolutely no evidence showing one of the essential elements of negligence, namely, a reasonable anticipation that petitioner might suffer some injury. Merely requiring a worker to perform the ordinary and usual tasks of the occupation which have been performed by the worker hundreds of times and by other employees thousands of times daily, cannot con-

stitute negligence unless the employee has protested that the work is too strenuous for that particular employee, or has requested assistance.

Regardless of the inadequacy of the F. E. L. A. to deal with the social problem of compensation for injured railroad employees, this Court is governed by that Act, and it predicates liability upon negligence of the employer.

Furthermore, Petitioner's failure to introduce in evidence to show that two or more persons could in fact have performed the work assigned, or that assistance would have prevented injury, precludes her from recovery.

II. The Court of Appeals should be affirmed since its decision is neither capricious nor unreasonable, and is based upon a fair appraisal of the facts. It is not the function of this Court to merely second-guess the courts of appeals on questions solely involving an analysis of the facts. The policy of second-guessing the courts of appeals upon such questions demotes those courts to mere stumbling blocks on the way to a final determination by this Court.

ARGUMENT AND AUTHORITIES

I. THERE WAS INSUFFICIENT EVIDENCE OF NEGLIGENCE TO PRESENT A JURY ISSUE SINCE PETITIONER FAILED TO PROVE ANY DUTY OWED TO HER BY THE RESPONDENT.

Actionable negligence has been defined countless

times and in innumerable abstract terms. Each of the definitions, however, encompass the following elements:

(1) The existence of a situation from which a reasonably prudent person would anticipate an injury to another, thus creating a duty to take some measure to protect that person;

(2) A breach of that duty; and

(3) An injury resulting from that breach.

See *Milwaukee & St. Paul Railway Co. vs. Kellogg*, 94 U. S. 469 (1877), and *Holder v. St. Louis-San Francisco Railway Co.*, 172 Fed. (2d) 217 (1949) and *A. L. I. Restatement of Torts*, § 310.

There was absolutely no evidence showing the existence of a circumstance from which respondent could have been expected, under any stretch of the imagination, to have anticipated some injury to the petitioner, thus placing a duty upon respondent to use extraordinary means of precaution.

On the occasion in question petitioner was doing the same job she had previously done on many, many occasions, and the same job that thousands of other railroad employees daily perform throughout the country. Before "bidding the job in", or requesting the job at Monahans, she knew it entailed handling the mail. Her only concern or comment about this position or her assigned work was that she could not wear skirts and hose, as had been requested of her on another Division of the railroad, and still handle the mail. At no time did she complain to her superior, or

to any of her fellow workers who daily occupied desks in the same room with her, that the job was too strenuous for her or that assistance was desired.

Unless an employer has noticed that an employee is suffering from some physical defect or disease, the employer is entitled to assume that the employee is a person in ordinary physical condition and is obligated to furnish assistance only if the work is too strenuous for a person of ordinary physique. *Louisville & N. R. Co. vs. Willhite*, 187 S. W. (2d) 1010 (Ky.) (1943). *Texas & Pacific Ry. Co. vs. Rampy*, 71 S. W. (2d) 387 (Tex. Civ. App.) (Error Dismissed) (1934).

Petitioner cites no cases, and respondent has been unable to find any case, holding that a jury issue is presented when there has been no protest that the work is too strenuous and no request for additional help. Although this Honorable Court has not passed on this precise question, other courts have passed upon the question and have been unanimous in denying recovery upon the ground that no duty arose by reason of the lack of knowledge on behalf of the employer, since there could have been no reasonable anticipation of injury to the employee.

In *Wadiak vs Illinois Central RR Co*, 208 Fed. (2d) 925 (C. A. 7) (1953), the Court was faced with a contention of negligence on the ground of insufficient help without protest or request on behalf of the employee, and the Court stated, at page 929:

> "In the absence of proof that such aid was sought and denied to him, or that any need for

help was brought to defendant's notice, plaintiff cannot rely on this contention."

To the same effect see *Louisville & Nashville R. Co. vs. Green*, 53 So. (2d) 358 (Ala.) (1951); *August vs. Texas & N. O. R. Co.*, 265 S. W. (2d) 148, (Tex. Civ. App.) (Writ refused, N. R. E.) (1954); *Lowden vs. Bowen*, 183 Pac. (2d) 980 (Okla.) (1947); and *Mercier v. Texas & N. O. R. Co.*, 293 S. W. (2d) 80 (Tex. Civ. App.), (Writ Refused, N. R. E.) (1956). All of these were F. E. L. A. cases arising after the abrogation of assumption of risk doctrine. See also, *Annotations* in 175 A. L. R. 1003 *et seq.*, and 36 A. L. R. (2d) 22, *et seq.*

In Texas, if an eligible employer fails to subscribe for Workmen's compensation insurance, the employee may recover upon the ground of negligence, and the defenses of assumed risk and contributory negligence are expressly denied the employer, thus cases of that nature are of value.

The Supreme Court of Texas in *Great Atlantic & Pacific Tea Co. vs. Evans*, 175 S. W. (2d) 249 (1943) stated, at page 251:

"Although injury may result from a person's act or omission, yet, if the actor could not have reasonably foreseen the resultant injury, or injuries, similar in character, he is not to be held responsible therefor.....

"Measured by the above rules of law, we are convinced that the facts of this record fail, as a matter of law, to convict A. & P. of actionable negligence..... Evans cannot complain if A. & P. merely required him to do the usual and cus-

> tomary work required of persons in his line of employment, or, stated in another way, required by the character of the business in which he was employed."

See also *Western Union Telegraph Co. v. Coker*, 204 S. W. (2d) 977 (1947) also by the Supreme Court of Texas.

While none of the above cited cases are binding upon this Honorable Court, under the doctrine of *stare decisis*, the very unanimity of the decisions rendered by the court of appeals and courts of last resort in the sovereign states, are entitled to great weight in this Honorable Court.

Each of the "strain cases" cited by petitioner, *Stone vs. New York, Chicago & St. Louis Ry. Co.*, 344 U. S. 407 (1953), *Blair vs. Baltimore & Ohio Ry. Co.*, 323 U. S. 600 (1945) and *Comiskey vs. Pennsylvania Railroad Co.*, 228 Fed. (2d) 687 (2 C. A. 1956), involved a protest that the work was too strenuous, or a request for additional help on behalf of the worker.

Petitioner in her brief asserts that under the doctrine of *Tiller vs. Atlantic Coast Line*, 318 U. S. 54 (1943), the actions of the employee are immaterial, since all vestiges of the doctrine of assumption of risks have been abrogated. That such doctrine has been abrogated is uncontroverted. However, the point here made is not that the petitioner assumed the risk by failing to ask for help or make complaint, but that in the absence of such complaint or request, respondent could not have anticipated an injury to her, thus

giving rise to the duty to relieve petitioner of her duties, or furnishing her additional assistance.

Although petitioner had ample opportunity through her own testimony, or through the testimony of any of the other witnesses for the railroad, to show that more than one person could perform the job of lifting sacks between the R. P. O. car and the truck, she did not choose to do so. She did not introduce any evidence that more than one person could stand in the doorway of the R. P. O. car. In other words, she did not introduce evidence to show that if additional assistance had been available she would not have had to lift the sacks by herself.

This Honorable Court has criticized the Federal Employers Liability Act in that it predicates compensation for industrial injuries suffered by railroad employees upon negligence on behalf of the employer, and has construed the Act liberally in favor of the worker. See Mr. Justice Frankfurter's concurring opinion in *Wilkerson vs. McCarthy*, 336 U. S. 53, 65-66 (1948). See also *Schulz vs. Pennsylvania R. R. Co.*, 350 U. S. 523 (1956).

However inappropriate and outmoded the F. E. L. A. may be in coping with the social problem of compensation for injured railroad employees, Congress has in fact predicated liability upon negligence by a solemn Act of that body, and any amendment, alteration or change in this law lies in the exclusive province of the legislative branch of the government and not in the judicial branch.

Judge Goodrich writing for the Third Circuit in *Eckenrode vs. Pennsylvania R. Co.*, 164, Fed. (2d) 996 (1947) *affirmed* 335 U. S. 329 in setting aside a jury verdict and rendering judgment for the railroad stated at page 1000:

> "Any Federal Judge who sees these railroad accident cases come in and go out of the courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist."

To the same effect see *Wolfe vs. Henwood*, 162 Fed. (2d) 998 (C. A. 3) (1947), *cert. den.* 332 U. S. 773.

When there are no contested issues of material fact, it becomes the duty of the trial court to take the case from the jury. This is applicable in F. E. L. A. cases. This Court in *Brady vs. Southern Railway Co.*, 320 U. S. 476 (1943), stated the proposition as follows, at pp. 479, 480:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit directed verdict or otherwise in accordance with the applicable practice without submission

to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The simple unvarnished facts in the instant case show that an employee who had been suffering from a kidney ailment without the knowledge of the employer was injured while doing the normal and usual tasks that she and thousands of other railroad employees have done and now do every day without mishap. A holding that a jury issue was presented in this case would in fact be a holding that the mere occurrence of an injury is evidence of negligence raising a jury issue, and there would be no redress from unreasoned verdicts based upon wild speculation or sympathy for the injured party.

II. THIS COURT SHOULD AFFIRM A CAUSE INVOLVING ONLY A SUFFICIENCY OF THE EVIDENCE QUESTION, IF THE OPINION BELOW IS NEITHER CAPRICIOUS NOR UNREASONABLE AND IF BASED ON A FAIR APPRAISAL OF THE RECORD.

The principal function of this court is to decide causes containing fundamental questions with far-reaching application of which it has cognizance, and thus provide guide-posts and light the way for bench, bar and citizen to a better understanding of the ever-winding road of our laws in this rapidly changing world. Settling a controversy justly between any two litigants is a minor and subsidiary function of this court. It is therefore the policy of this court to deny

review where the case turns solely upon an analysis of the particular facts involved. See *Labor Board vs. Pittsburgh Steamship Company*, 340 U. S. 498. (1951). See also Mr. Justice Harlan's dissent in *Rogers vs. Missouri Pacific Railway Company, Webb vs. Illinois Central Railway Company, Herdman vs. Pennsylvania Railroad Company*, and *Ferguson vs. Moore-McCormack Lines*, 25 U. S. Law Week, 4130, *et seq.* (1957).

A notable exception to this policy has been in the family of employer liability cases involving the question of sufficiency of the evidence to prove negligence. From the 1938 through the 1954 terms of this court, the court granted review in 46% of the applications on sufficiency of the evidence question filed by the workers. In this term of court, four of these cases have already been decided. We understand that aside from this case, there is at least one more up for consideration by this court.

An explanation of this exception may perhaps be due to the natural sympathy we all feel for an uncompensated, seriously injured workman. This Honorable Court, already overburdened with work, has thus further increased its work load in an attempt to see that no individual injured worker may be deprived of his compensation unjustly.

The alarming amount of time spent by this Court on these questions has in the past evoked criticism from both within and without the court. See Mr. Justice Frankfurter's decision in *Rogers vs. Missouri Pacific Railway Company, Webb vs. Illinois Central*

Railway Company, Herdman vs. Pennsylvania Railroad Company, and *Ferguson vs. Moore-McCormack Lines,* 25 U. S. Law Week, 4119, *et seq.* (1957), and note in 69 *Harvard Law Review,* 1441 *et seq.,* (1956).

It is reasonable to suppose that such criticism will continue with some degree of justification, since this court owes a duty to protect litigants in diversity of citizenship cases as well as litigants in the employer liability cases, and yet there is a wide disparity of treatment in the two types of cases.

Our courts of appeals were intended to be courts of last resort in all but those few cases involving widespread fundamental questions.

An examination of the decisions of this court on this question, because of the very nature of the subject matter, is of little or no value to inferior courts, the bar and litigants in resolving questions other than those identical in the most minute detail with a decision of this court in other pending and future cases. The decisions have not had the effect of reducing appellate litigation by settling these cases, but have actually increased appellate litigation.

A further examination of these decisions shows that each Justice has made his own analysis of the facts in each case, and determined therefrom whether or not he would have taken the case from the jury had he sat upon the trial bench, without regard to the opinion of the intermediate court. Competent judges have in the past, and will in the future, disagree as to whether or not they would have submitted a particular

case to the jury. The final result of the cases decided by this court have depended primarily upon the background and disposition of the majority of the Justices then sitting upon the court.

The problem has been very aptly stated as follows:

"If there were a bright line dividing negligence from non-negligence, there would be no problem. Only an incompetent or a wilful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree as to whether proof in a case is sufficient to demand submission to the jury . . . . . The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge." *Wilkerson vs. McCarthy*, 336 U. S. 64, 65 (concurring) (1949).

In past decisions this Court has merely substituted the opinion of its individual Justices for the opinion of the court of appeals or court of last resort of one of the sovereign states. It has been a second-guessing game or a matter of a coin flip.

This manner of deciding the cases and in addition the great percentage of applications granted, has given rise to a vicious circle, tending to increase more and more the time spent by this court on such cases. The unsettled condition of the law and the determina-

tion of so many of these cases by this court, has judicially encouraged the filing of more petitions for Writ of Certiorari, and the unfortunate litigant whose application is not granted, feels discriminated against, with some justification. The very same feeling within the court may give rise to granting more and more writs and again and again second-guessing inferior courts.

This policy has demoted our courts of appeals and the highest courts of our sovereign states from courts of last resort into mere intervening, expensive and time-consuming stumbling-blocks for the litigants on their way to reach this Court. This accident occurred in 1953. It has still not been settled, and before it is settled each of the parties will have expended over $1,500.00 in out-of-pocket expenses, not including attorneys' fees.

An adoption of a policy of overturning decisions of the courts of appeal and the courts of last resort in our sovereign states, only if the decisions of those courts are capricious, unreasonable or based upon an unfair appraisal of the facts, will to a great extent take this court out of the field of second-guessing those court's analyses of the facts, and still afford this court ample opportunity to correct serious and palpable errors committed below.

The decision of the Court of Appeals for the Fifth Circuit in the instant case, is a well considered opinion, based upon an exhaustive examination of the facts, as is evidenced from the mere reading of the opinion. That court, after due deliberation, found

that the jury verdict in this case was not based on evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence, which is the test laid down in *Moore vs. Chesapeake and Ohio Railway Company*, 340 U. S. 573 (1951). The Court of Appeals dutifully performed its function to see that jury verdicts stay within that boundary, and that they be arrived at by reason and not by will of sheer speculation. The Court of Appeals for the Fifth Circuit is an honorable court, composed of competent and conscientious judges, who, after due deliberation, have determined that the jury verdict in this case was not arrived at by reason but by will born of sympathy or out of sheer speculation.

In the light of all of the facts in the case, this Honorable Court therefore should not reverse that decision merely because individual justices would have disagreed with the result. That decision should only be reversed in the event the court finds that the decision was not based upon reason or an unfair appraisal of the facts. See Mr. Justice Harlan's dissent in *Rogers vs. Missouri Pacific Railway Company, Webb vs. Illinois Central Railway Company, Herdman vs. Pennsylvania Railroad Company*, and *Ferguson vs. Moore-McCormack Lines*, 25 U. S. Law Week, 4130, 4131, 4132 (1957).

If the practice of mere second guessing the inferior courts in these cases is continued, the function of the courts of appeal or the state court of last resort is nugatory, and in the interest of time and justice, the parties and the judicial system could be saved time

and expense by a direct petition for writ of certiorari to this Court from the trial court.

CONCLUSION

For the reason stated, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

OF COUNSEL:

WAGSTAFF, HARWELL,
ALVIS & POPE
Abilene, Texas

JOHN B. POPE

J. B. LOOK

I hereby certify that a copy of the above and foregoing brief on the merits were served on Messrs. Dallas Scarborough, Davis Scarborough and Madam Beverly Tarpley, attorneys of record for the petitioner, by depositing a copy for each of them in the United States Mails, addressed to each of them at the Alexander Building, Abilene, Texas, this the 16th day of March, 1957, in accordance with Paragraph I of Rule 33 of the Rules of the Supreme Court of the United States.

JOHN B. POPE

FILED
MAY 3 1957
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 821

OCTOBER TERM, 1956

* * *

RUBY NELL THOMSON, *Petitioner*

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
DECIDED BY THIS COURT ON MARCH 4, 1957

* * *

PETITION FOR REHEARING

* * *

J. R. LOCK,
WAGSTAFF, HASWELL,
ALVIS & PORT,
Citizens National Bank
Building
Abilene, Texas

Attorneys For Respondent

ARGUS PUB. CO. ABILENE, TEX.

INDEX

	Page
Grounds for Rehearing	1
Argument	1
Conclusion	5
Certificate of Counsel	5

LIST OF AUTHORITIES

Cases: Page

August vs. Texas & N. O. Ry. Co., 265 S. W. (2d) 148 2

Blair vs. Baltimore & Ohio Ry. Co., 323 U. S. 600 2

Brady vs. Southern Ry. Co., 320 U. S. 476 3

Comiskey vs. Pennsylvania R. R. Co., 228 Fed. (2d) 687 2

Great Atlantic & Pacific Tea Co. vs. Evans, 175 S. W. (2d) 249 2

Louisville & N. R. Co. vs. Willhite, 187 S. W. (2d) 1010 2

Louisville & Nashville R. Co. vs. Green, 53 So. (2d) 358 2

Lowden vs. Bowen, 183 Pac. (2d) 980 2

Mercier vs. Texas & N. O. R. R. Co., 293 S. W. (2d) 80 2

Stone vs. New York, Chicago & St. Louis Ry. Co., 344 U. S. 407 2

Texas & Pacific Ry. Co. vs. Rampy, 71 S. W. (2d) 387 2

Wadiak vs. Illinois Central R. R. Co., 208 Fed. (2d) 925 2

Western Union Telegraph Co. vs. Coker, 204 S. W. (2d) 977 2

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 321

OCTOBER TERM, 1956

* * *

RUBY NELL THOMSON, *Petitioner*

VS.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

PETITION FOR REHEARING

Respondent presents its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

The memorandum per curiam opinion of this Honorable Court is in direct conflict with prior full opinions of this Court and summarily overrules long established unanimously accepted rules of law.

ARGUMENT

The decision in this cause leaves the only question involved unsolved. The per curiam order when taken together with the published opinion of the Court of Appeals below is ambiguous. Bench and bar cannot determine whether the decision of this Honorable Court herein means that it is unnecessary for an employee to request the assistance when injured performing the regular duties of the employment and thus by implication overruling a proposition of law heretofore unan-

imously followed by all of the courts or whether the decision meant that the Court found in the instant case the employee did in fact present sufficient evidence to warrant a finding that a request had been made to present a jury issue. Either proposition is in conflict with prior opinions of this Court and with a unanimous line of decisions by inferior United States Courts and courts of last resort of our sovereign states. See: *Louisville & N. R. Co. vs. Willhite*, 187 S. W. 2nd 110 (Ky.) (1943); *Texas & Pacific Ry. Co. vs. Rampy*, 71 S. W. 2nd 387 (Tex. Civ. App.) (Error Dismissed) (1934); *Wadiak vs. Illinois Central R. R. Co.*, 208 Fed. 2nd 925 (C. A. 7) (1953); *Louisville & Nashville R. Co. vs. Green*, 53 So. 2nd 358 (Ala.) (1951); *August vs. Texas & N. O. R. Co.*, 265 S. W. 2nd 148 (Tex. Civ. App.) (Writ refused, n.r.e.) (1954); *Lowden vs. Bowen*, 183 Pac. 2nd 980 (Okla.) (1947); *Mercier vs. Texas & N. O. R. Co.*, 293 S. W. 2nd 80 (Tex. Civ. App.) (Writ refused, n.r.e.) (1956); *Great Atlantic & Pacific Tea Co. vs. Evans*, 175 S. W. 2nd 249 (1943); *Western Union Telegraph Co. vs. Coker*, 204 S. W. 2nd 977 (1947); *Stone vs. New York, Chicago & St. Louis Ry. Co.*, 344 U. S. 407 (1953); *Blair vs. Baltimore & Ohio Ry. Co.*, 323 U. S. 600 (1945); *Comiskey vs. Pennsylvania Railroad Co.*, 228 Fed. 2nd 687 (2 C. A. 1956).

This cause was tried in the trial court upon the pleadings of the plaintiff alleging a request for assistance and a refusal to supply the assistance and the trial court based its charge to the jury upon that basis. (Tr. 168-169). The Court further instructed the jury:

> "Unless you find and believe from a preponderance of the evidence that the plaintiff has established her case as alleged in her complaint, which

was read to you, you will find for the defendant." (Tr. 170).

No objection was made to this charge by the plaintiff and it is the law of the case. The evidence wholly failed to establish a request in refusal for assistance and the employee has never since claimed there was such a request and refusal and the employee has never claimed there was any such evidence.

In the event the Court by its decision intended that the employee had asked for help or had been instructed not to ask for help this Court is by implication overruling the cause of *Brady vs. Southern Railway Co.*, 320 U. S. 476 (1943) which unequivocally laid down the rule that there must be more than a scintilla of evidence before a cause may be submitted to the jury.

It must be remembered that this was not a circumstantial evidence case. All of the persons concerned were available and testified at length. The employee's counsel on direct examination developed in meticulous detail everything which was said between her and her superior. It is true that at one time when asked if she asked another employee for help, she stated:

> "No. I had been instructed I was not to ask, I couldn't have anyone to work the mail with me, there wasn't any need to ask." (Tr. 44).

But when pressed a little further with the question:

> "Actually, wasn't the duties outlined to you to assist with the mail and baggage?" (Tr. 45).

She replied:

> "No. Mr. Higginbothm told me, now this is just oral, but this is what he said, the best I can remember, I was to take this one car, this one truck, and take it out and take what is on there and put it on the train and take this on the train and bring it and put it back into the baggage room" (Tr. 45).

This is all of the evidence upon this point. She nowhere testified that *any superior* instructed her to that effect.

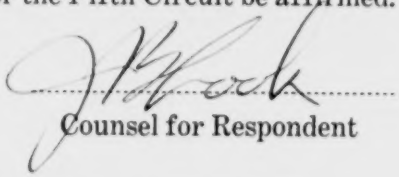
A jury may not properly take any one particular statement completely out of context and without regard to any clarification the witness may have made on the statement.

The mere unresponsive statement that she had been instructed not to ask and that there was not any need to, when taken together with the facts that she related all of her relevant conversations with any supervisors and that none of these conversations or communications showed that she had in fact been so instructed would present at most a mere scintilla of evidence which cannot support a jury issue. While ordinarily disposition of this case by memorandum decision would be in order in view of the recent full treatment of sufficiency of the evidence questions by this Court, the memorandum order issue entered upon closer examination shows that it has the effect of overruling by implication one of two long, well-established principals of law heretofore followed by this Honorable Court and bench and bar can not determine which one the Court intended to overrule and gives rise to the need for this Honorable Court to take up these questions separately

in later causes in order to clarify this Honorable Court's position and settle the law.

CONCLUSION

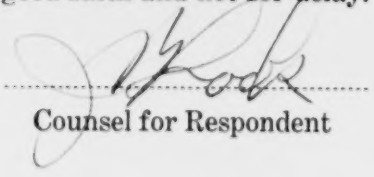
For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment of the Circuit Court of Appeals for the Fifth Circuit be affirmed.



Counsel for Respondent

CERTIFICATE OF COUNSEL

I, J. B. Look, counsel for the above-named respondent, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.



Counsel for Respondent